Supreme Court, U.S.
FILED
93 2008 JUN 17 1994
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CAROL & JOHN SHAY,

Petitioners,

v.

BRUCE MAHLER, et ux.,

Respondents.

PETITION FOR APPEAL TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Carol & John Shay
Pro Se
1506 Winford Road
Baltimore, MD 21239-3537
410-433-5995

40pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the following in the case concerning non-resident, pro se, petitioners/plaintiffs constitute violations of the petitioners/plaintiffs' Constitutional rights:

   a. state courts failed to follow the state rule of law in deciding the case;
   b. the failure of the trial judge to consider any pre-trial settlement discussion;
   c. the failure of the trial judge to recuse himself, notwithstanding his interest in the law practice that he had with the defendants' attorney eighteen months prior to the trial;
   d. the granting of a jury trial absent a request in writing in accordance with the West Virginia Rules of Civil Procedure;
   e. the defenses' characterization of the plaintiff non-residents as carpetbaggers who were in West Virginia to take unfair advantage of West Virginia citizens and particularly the defendants?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED 5

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE 7

STATEMENT OF THE CASE 8

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 17

APPENDIX 29

TABLE OF AUTHORITIES

Chamberline v. McBee, 171 WV 755,
356 SE2d 626 24

Gibson v. WV Department of
Highways, 406 SE2d 440 27

Lengyel v. Lint, 167 WV 272,
280 SE2d 66 . . . . . 24, 27, 28

Thacker v. Tyree, 171 WV 110,
297 SE2d 885 (1982) 23, 24, 28

U.S. Constitution - 14th Amendment 21, 22
Article IV 22
5th Amendment 22

West Virginia Constitution, Article III,
Section 10 26

West Virginia Rules of Civil Procedure,
Rule 38 21

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTIONS OF THIS COURT IS INVOKED

By decision of March 23, 1994 the West Virginia Supreme Court of Appeals refused petitioners' appeal.

The jurisdiction of the Supreme Court of the United States is invoked on the grounds that the state courts of West Virginia decided important questions of federal law which have not been, but should be, settled by this court.

The petitioners' constitutional rights were denied under the privilege and immunities clause; the equal protection clause, and the due process clause when the West Virginia courts:

1. failed to follow the applicable rule of law in adjudicating the petitioners' case;

2. failed to consider why the trial judge did consider the settlement of this case prior to trial;

3. failed to recuse the trial judge who had a law partner interest with the defendants' attorney until eighteen months prior to the trial at issue;

4. provided a jury trial contrary to the West Virginia Rules of Civil Procedure;

5. allowed the defense to characterize the plaintiffs as carpetbaggers who were in West Virginia to take unfair advantage of West Virginia citizens and particularly the defendants.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

14th Amendment of the Constitution of the United States -

> Section 1. "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.

5th Amendment of the Constitution of the United States -- "... nor be deprived of life, liberty, or property, without due process of law; ... .

STATEMENT OF THE CASE

The petitioners (Plaintiffs in the Circuit Court) purchased a parcel of real property with improvements identified as Rt. 4, Box 335, Mountain Lake Road, Hedgesville, West Virginia 25427.

Prior to settlement, the petitioners jointly and severally inspected the improvements. Mrs. Shay visited the property with a friend, Mrs. Carry Broden, to take measurements for curtains. During this visit, Mrs. Shay and Mrs. Borden pointed out to Mr. Mahler certain water stains in the closet area on the second floor. (This closet area is directly underneath the roof, there is no attic.) Mr. Mahler assured them that the leaks were repaired.

On one visit the petitioners were accompanied by a friend, Mr. Howard Hughes, who is a qualified inspector for the Federal Government and an expert on

construction of residential and commercial buildings.

A complete tour of the house revealed no problems. The petitioners saw and were aware that all of the interior ceilings were freshly painted and spackled. The petitioners saw nothing that did not comport with a freshly spruced up house on the market for sale. The petitioners were aware of the inordinate amount of wood stored in the basement and agreed that the Defendants could remove the wood just prior to possession by the petitioners. The petitioners were unaware at the time of the visits that the stored wood in the basement was used to conceal the extreme dampness in the basement and further concealed the defective and inadequate plumbing in the basement.

The petitioners' inspector, after finding no visible problems within the house called attention to the roof which was described as a "sick roof." Mr. Mahler

responded that the shingles on the roof should last at least 5 years and that the roof was in excellent condition.

At one point in time prior to settlement, which took place on April 30, 1990, the petitioners called Mr. Mahler's attention to the dampness of the basement. He attributed it to the wood which was stored in the basement.

The petitioners paid the appraised value of the property, which was $94,000.00, and took possession of the property on June 1, 1990.

Upon occupancy on June 1, 1990, the petitioners were amazed at how large the basement area actually was, as well as how damp, and also noticed water stains on the cinder block foundation walls in several areas throughout the basement. Various measurements of the moisture were taken which showed the relative humidity at between 80% to 95%. It was also noticed that sewage

was leaking from plumbing in the basement. This could not have been previously seen due to wood being stored literally from basement to ceiling. The leaking plumbing had rags and newspapers wrapped around it. It was also noticed at this time that the plumbing was a mixture of white and black plastic. Technically, black ABS (Acrylonitrile Butadiene Styrene) and white PVC (Polyvinyl Chloride) pipe cannot be connected without the use of universal couplings. When the pipes are connected without a universal coupling, the pipes at the connection chemically interact causing the connections to deteriorate and eventually separate or break apart. These problems with the plumbing could not be seen by a reasonable inspection by the petitioners and others because of the inordinate amount of wood which was stored in the basement from floor to ceiling at the time of these inspections. These problems were eventually

corrected by replacing all of the piping in the basement at a cost of $600.00.

In June and early July of 1990, some moisture spots and shading could be seen in several places on the interior ceilings of the second floor of the house. The petitioners replaced the shingles to improve the roof covering and to, hopefully, prevent further moisture spotting and shading of the interior ceiling on the second floor.

During the removal of the shingles, the contractor actually fell through a rotted portion of the roof. It was discovered at this time upon close inspection with the shingles and insultation removed that the exterior side of the roof of the second floor ceiling was heavily water stained. It was clear from this inspection that the defendants spackled and painted the interior ceilings on the second floor to conceal the various moisture spots

which resulted from actually having no roof, but only tar paper and shingles to protect the house from the elements. Literally, there was no roof.

Another painting contractor, who inspected the property in early 1991 in preparation for the suit, pointed out many more areas of moisture on the ceilings which had bled through in the passage of time. The entire roof was replaced at a cost of $5,400.00.

The dampness/wetness problem in the basement has been of a continuing nature. Initially, an estimate of $6,474.25 was received which would contain moisture once it penetrated into the basement. Upon further study, it was determined that the best course to take in preventing basement moisture/wetness was to keep the water from entering the basement. Along these lines, a french-drain system was installed for $1,337.00. During this time, the petitioners applied for refinancing which

required an appraisal of the property. The refinancing of the property could not be obtained until this drain system was installed because the appraiser discovered the high humidity readings in the basement, as well as indications of water leakage. The drain system failed to fully correct the problem. Subsequently, bentonite sheets were affixed to the undergrade exterior foundation of the house at a cost of $4,013.98 and the upper grade exterior foundation was waterproofed at a cost of $290.00, and lastly, in September of 1993, sodium bentonite was pumped around the exterior foundation of the house for a cost of $7,600.00.

All of these figures were submitted to the Circuit Court, except the last amount as this work was completed in September 1993, after the July 1993 jury trial.

The petitioners by letter dated March 1, 1991

notified the defendants of various defects in the house and requested reimbursement for the roof only.

The Mahlers responded by letter of March 20, 1991. They pointed out that the defects in the roof were such that they were unknown to the purchaser-petitioner and were not disclosed by reasonably diligent inspections.

Suit was initiated. A recusal of a second judge (the first judge lost his seat on the Circuit Court bench by election) was granted since the second judge initially represented the defendants. A recusal of a third judge was denied notwithstanding the fact that the judge was the former law partner of the defendants' attorney.

The jury rendered a verdict for the defendants, and the petitioners' Motion For Judgment Notwithstanding the Verdict was denied.

The West Virginia Supreme Court of Appeals

refused a petition of appeal by order of March 23, 1994.

The petitioners file herein for a writ of certiorari to the Supreme Court of the United States.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The applicable rule of law in West Virginia is:

a. vendor has the duty to disclose to the purchaser the existence of defects or conditions substantially affecting the value or habitability of the property;

b. the existence of the defects or conditions are unknown to the purchaser;

c. the defects or conditions would not be disclosed by a reasonably diligent inspection;

d. the vendor's failure to disclose will give rise to a cause of action in favor of the purchaser.

The facts as proved below show:

a. the vendor breached his duty to disclose to the purchaser the existence of the following which substantially affected the value and habitability of the property;

(1) Literally there was no roof; there was only the shingles and tar paper. The roof itself was rotted and cost the petitioners over $5,000.00 to replace.

(2) The plumbing had disintegrated costing the petitioners $600.00 to replace.

(3) The dampness throughout the basement has been partially corrected at a cost of $13,249.98.

b. The existence of the defects were unknown to the purchasers;

c. A reasonable and diligent inspection failed to disclose the defects;

d. The West Virginia Courts in light of having the above shown by the evidence of record failed to allow a cause of action by the purchasers for compensatory and punitive damages.

The record before the trial court was replete with clear and convincing evidence of the Mahlers' actions

and the fraud which they perpetrated against the plaintiffs.

The following in the initial case concerning pro se, non-resident plaintiffs constituted violations of the petitioners' rights under the Constitution of the United States, i.e., the privilege and immunities clause, the equal protection clause and the right of due process:

1. The failure of the trial judge to recuse himself, notwithstanding the decision of the Supreme Court of Appeals of West Virginia of July 9, 1993;

2. The failure of the trial judge to consider any settlement discussion which was contrary to the disposition of any case or controversy;

3. The trial judge's decision to grant a jury trial, notwithstanding either parties refusal to request such a jury trial in writing in accordance with the West Virginia Rules of Civil Procedure;

4. The defense characterization of the plaintiff non-residents as carpetbaggers who were in West Virginia to take unfair advantage of West Virginia citizens and

the defendants;

5. The failure of the trial judge to consider the applicable law of West Virginia in his judgment notwithstanding the verdict of August 26, 1993;

6. The decision by the West Virginia Supreme Court failed to consider in its judgment the applicable law of West Virginia pertaining to this case.

1.

In the first instance, the petitioners' request for recusal of June 3, 1993 to the West Virginia Supreme Court of Appeals was based on the fact that the attorney for the defense was a law partner of the judge and that their partnership was not ended until their buy-out in January of 1992 or seventeen months before our request for the judge's recusal.

2.

In the second instance, the judge made no attempt to resolve any of the issues in this case prior to trial

which the petitioners believe is contrary to good and sound resolution of cases and controversies.

3.

In the third instance, concerning a jury trial, the West Virginia Rules of Civil Procedure in Rule 38 sets out the following in pertinent part:

> .. (b) Any party may demand a trial by jury ... by serving upon the other parties a demand therefor in writing ... .

Neither party requested a jury trial in accordance with the rule. However, the judge determined that a jury trial was appropriate. This decision violated the plaintiffs/petitioners' right of due process.

All of these instances involved in the proceedings below involved obvious and gross error on their face. This error constitutes arbitrary action by the courts of West Virginia and violates the petitioners' guaranty of substantive due process of law under the Fourteenth and

Fifth Amendments of the Constitution of the United States of America, and clearly conflict with the fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

4.

Moreover, the intimation and characterization by the defense that the petitioners were carpetbaggers taking unfair advantage of the citizens of West Virginia and the defendants constituted discrimination and an incidious distinction which violated the petitioners' right to the privileges and immunities of Section 2 of Article IV and the second clause of the 14th Amendment of the Constitution of the United States of America.

This intimation and characterization flies in the face of the U.S. Constitution's prohibition of sophisticated as well as simple-minded modes of

discrimination as set forth in a long line of racial discrimination cases by this court. Therefore, absent any statement by the courts below condemning and dismissing this invidious distinction or unreasonable classification, it is the petitioners' firm belief that this intimation and characterization by the defense created a violation of the petitioners' right to Equal Protection of the Laws under the provisions of the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

5.

The applicable law of West Virginia was very clearly enunciated by its highest court on November 19, 1982 in the case of Edwin G. Thacker et al. v. Melvin L. Tyree, et al., 171 WV 110, 297 SE2d 885 (1982). This law places upon a vendor of the duty to disclose to the purchaser the existence of defects or conditions which

substantially affect the value or habitability of the property and the existence of which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection. The vendor's failure to disclose will give rise to a cuase of action in favor of the purchaser.

This rule in Thacker v. Tyree evolved from a sequence beginning in 1981 with Lengyel v. Lint, 167 WV 272, 280 SE2d 66 which expressed the proposition that a vendor of real property may be liable to the vendee in an action of fraud.

In 1987, these principles in Thacker v. Tyree as well as Lengyel v. Lint were confirmed in Chamberline & Flowers, Inc. v. McBee, 171 WV 755, 356 SE2d 626.

The petitioners inspected the property; however, these inspections were rendered null and void by the

Mahlers' concealment of:

a. the factual condition of the roof;

b. the factual condition of the basement plumbing;

c. the factual condition of the dampness/wetness in the basement.

The Mahlers' concealment of the factual conditions substantially affected the value and habitability of the property.

The value was affected by more than $19,240.98 which included $5,400.00 for the roof, $600.00 for the plumbing in the basement, and $13,240.98 for basement moisture problem ($1,337.00 for the drainage ditch, $4,013.98 for the bentonite panels, $290.00 for the waterproofing treatment, and $7,600.00 for pumping the bentonite).

The habitability was affected by not having a roof

but merely shingles on tar paper. There was no protection from the elements. The moisture from the basement pervaded the house and must be controlled in order to minimize moisture problems which threatens the structural integrity of the house.

The record before the trial court was replete with clear and convincing evidence of the Mahler's actions and the fraud which they perpetrated against the plaintiffs.

The petitioners contend that the decisions in this case were violative of the petitioners' right to due process as their decisions failed to protect the petitioners' property rights and failed to comport with the deepest notions of what is fair and right and just.

The trial court failed to comply with the provisions of Section 10 of Article III of the Constitution of West Virginia which contains the state's principle of

equal protection of the law as a part of the due process clause (Gibson v. WV Department of Highways, 406 SE2d 440, 1991 when it allowed the Mahler's counsel to speciously characterize the plaintiffs as modern-day carpetbaggers who came in from out of state to take advantage of the defendants. In this portrayal of the plaintiffs, the Mahlers' attorney went beyond the bounds of representational propriety and reasonableness, and thereby breached his duty to the court as an officer of that court in "winning" his case but failing to comply with the applicable law as set out in the line of cases commencing with Lengyel v. Lint.

These actions colored or tainted the jury; however, the judge failed to remedy this prejudicial treatment of the plaintiffs in failing to grant the plaintiffs' renewal of their motion for a directed verdict at the close of the defendants' case. The judge further failed to

correct this prejudice in his denial of the plaintiffs' motion for judgment notwithstanding the verdict and by his failure to apply the law of West Virginia as set out in the line of cases by this court in Thacker, Lengyel and Chamberline & Flowers, Inc.

6.

The appeals court also failed to follow the applicable rule of law in this case.

APPENDIX

Order of the West Virginia Supreme Court of Appeals of3/23/94 30

Judgment Order of 8/26/93 of the Circuit Court of Berkeley County, WV 32

Order re Judgment NOV 34

Plaintiff/Petitioners' Argument in Support of the Judge's Recusal 36

Administrative Order of July 9, 1993 Denying Recusal of the Judge 39

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 23rd day of March, 1994, the following order was made and entered:

John A. Shay and Carol A. Shay,
Plaintiffs Below, Petitioners

vs.) No. 932051

Bruce Mahler and Ruth Mahler, Defendants
Below, Respondents

On a former day, to-wit, December 20, 1993, came the petitioners, John A. Shay and Carol A. Shay, pro se, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Berkeley County, rendered on the 26th day of August, 1993, with the record therein accompanying the petition.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

/s/

A True Copy _____

Clerk, Supreme Court of Appeals

IN THE CIRCUIT COURT OF BERKELEY COUNTY,
WEST VIRGINIA

JOHN A. SHAY and
CAROL A. SHAY,
PLAINTIFFS

VS. CIVIL ACTION NO. 91-C-462

BRUCE MAHLER and
RUTH MAHLER,
DEFENDANTS

JUDGMENT ORDER

This action came on for trial before the court and a jury, the Honorable David H. Sanders presiding, and the issues having been duly tried, and the jury having returned its' answers to the Interrogatorties propounded by the Court, and the jury on July 27, 1993, having rendered a verdict for the Defendants.

It is therefore ADJUDGED and ORDERED that the Plaintiffs take nothing from the Defendants, that this action is dismissed on the merits, and that the Defendants

recover of the Plaintiffs their cost of this action.

The clerk shall enter the foregoing as and of the day and date first above written and shall furnish attested copies to counsel of record.

Dated this 26th day of August, 1993.

JUDGE OF THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VA.

IN THE CIRCUIT COURT OF BERKELEY COUNTY,
WEST VIRGINIA

JOHN A. SHAY and
CAROL A. SHAY,
PLAINTIFFS

VS. CIVIL ACTION NO. 91-C-462

BRUCE MAHLER and
RUTH MAHLER,
DEFENDANTS

ORDER

This 26th day of August, 1993, came the parties upon the Plaintiff's Motion for judgment notwithstanding the verdict, said motion supported by memorandum, and upon the Defendant's response to said Motion.

Upon examination of the papers and pleadings herein, the Court finds that Plaintiff's Motion to be without merit, and said Motion is hereby DENIED.

The clerk shall enter the foregoing as and of the day and date first above written, and shall furnish

attested copies to all counsel of record.

JUDGE OF THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VA.

1506 Winford Road
Baltimore, Maryland 21239
June 3, 1993

Chief Justice Margaret Workman
West Virginia Supreme Court of Appeals
E-400 State Capitol
Charleston, West Virginia 25305

Re: John A. Shay and Carol A. Shay
vs.
Bruce Mahler & Ruth Mahler
Case No. 91-C-462

Dear Justice Workman:

This refers to Berkeley County Judge David H. Sanders' letter of May 26, 1993 to you concerning our request to him for his recusal from the case at issue.

We regret that Judge Sanders feels that he should not voluntarily recuse himself from this case.

From our perspective as pro se litigants, we would like to have the most level playing field possible.

As it is, we have a judge who was the former law partner of the attorney representing the Mahlers, Mr. Homer A. Speaker. Judge Sanders practiced with Mr. Speaker in a small town environment taking in the geographical areas of Shepardstown and Martinsburg, West Virginia.

On the other hand, we have no experience in

judicial litigation and have, as we understand, a formidable adversary who has the reputation of not only being an experienced litigator but one who is reputed to be a hard-nosed, uncompromising litigator. We anticipate, particularly since Mr. Speaker indicated that he was considering a two day jury trial, that many decisions will have to be made by the judge.

From a larger perspective, we cannot understand how any judge can be comfortable in making decisions in any case involving a former law partner. There seems to always exist the dual-faced question, did I rule with the issue or with the former partner, or against the former partner? This human trait actually transcends the bounds of bias, prejudice, and unfairness.

In our view, a law practice inextricably binds the partners economically, and, as in the issues cited by Judge Sanders concerning his practice with Mr. Speaker, well beyond dissolution of the partnership.

Of significant issue is the small town environment which provides for additional social contact beyond that required by the partnership.

In view of the foregoing, we do not think that any relationship as close and uniquely bound can be simply severed in any period of time, particularly in a two year period.

Please provide the most level playing field for us, and direct the recusal of Judge Sanders from this particular case, so that we can receive an unbiased hearing and a fair trial.

Incidentially, we appreciate Judge Sanders' action in considering our letter requesting his recusal as a motion for recusal, and his referral of this matter to you.

Very truly yours,

John A. Shay
Carol A. Shay

cc:
Honorable David H. Sanders
Homer A. Speaker, Esquire

ADMINISTRATIVE ORDER

SUPREME COURT OF APPEALS OF WEST VIRGINIA

RE: JOHN A. AND CAROL A. SHAY V. BRUCE MAHLER AND RUTH MAHLER, BERKELEY COUNTY CASE NO. 91-C-462

WHEREAS, the Honorable David H. Sanders, Judge of the Twenty-Third Judicial Circuit, has advised the Chief Justice of the Supreme Court of Appeals of a motion filed for his disqualification from presiding in the above-styled proceeding; and

WHEREAS, Judge Sanders has further advised the Chief Justice that he does not desire to disqualify himself voluntarily from presiding in said case; and

WHEREAS, upon review of said motion, and in accordance with Rule XVII (a)(3)(B)(i), the Chief Justice has determined that the matters set forth therein are facially insufficient to warrant such disqualification;

IT IS THEREFORE ORDERED that the Honorable David H. Sanders, Judge of the Twenty-Third Judicial Circuit, be, and he hereby is, directed to continue to preside in the above-referenced case; and

IT IS FURTHER ORDERED that the Circuit Clerk of Berkeley County record this order in the office of the said clerk and that proceedings be held in the manner provided by law.

/s/

ENTER: July 9, 1993 _____

MARGARET L. WORKMAN
Chief Justice